# Pembinaan Teris Sepakat Sdn Bhd v Kumpulan Ikram Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02 (W)-752–05 OF 2015
VERNON ONG, ABDUL RAHMAN SEBLI AND HASNAH HASHIM JJCA
13 MAY 2016

*Tort — Negligence — Contract — Contractor-subcontractor relationship — Soil investigation — Three soil investigations carried out on project site — Massive road embankment fill failure occurred after construction works approximately 80% completed — Works could not proceed — Whether investigators failed to adduce correct and accurate reports on soil conditions — Whether reports erroneous*

The appellant was a design and build/turnkey civil engineering contractor appointed by Jabatan Kerja Raya ('the employer') as the main contractor for a project. The first and second respondents provided soil investigation ('SI') works. The first respondent was appointed by the appellant to conduct SI at the project's site. The appellant appointed RMR Consult ('RMR') as the consultant engineer for the said project. RMR issued an instruction to the first respondent to conduct SI works at the project site and to carry out five exploratory boreholes at the locations as indicated in the plans. RMR issued a revised instruction to the first respondent superseding the earlier instruction and requiring, among others, seven exploratory boreholes probes to be carried out on the locations as indicated in the plans. After completing the SI, the first respondent prepared and submitted the SI reports ('the first SI report') to the appellant to be approved by the employer. RMR instructed the first respondent to carry out further tests on the exploratory borehole results and the test reports were submitted to RMR. In reliance on the employer's approval of the first SI report as well as the other test reports, RMR proceeded to design the project. This was followed by the appellant proceeding with the construction of the project. However, when the construction works were approximately 80% completed, a massive road embankment fill failure occurred. As a result, the works could not proceed and investigations were conducted to ascertain the cause of the failure. The appellant appointed the first respondent again to carry out a further confirmatory SI at the location where the failure occurred. This was duly done and a further SI Report ('the second SI report') was submitted to the appellant. RMR also produced a report in relation to the failure of the embankment and recommended remedial measures and submitted the said report to the employer. The employer neither approved nor accepted the recommended remedial measures. Subsequently, the employer terminated the

construction contract with the appellant. The appellant suffered losses and damages which formed the cause of action of the appellant's suit against the respondents in this appeal. At the trial the primary issue before the court was whether the first SI report prepared by the first respondent was inaccurate and erroneous and the sole cause of the embankment fill failure. The judicial commissioner ('the JC') dismissed the appellant's claim on the ground that the soil investigation that was carried out was not inaccurate or erroneous but instead it was due to insufficient soil investigation that resulted in inadequate design of the embankment. Hence the present appeal.

**Held**, dismissing the appeal:

(1) The JC had considered in depth the issues relating to the accuracy of the first SI report. RMR had instructed the carrying out of two exploratory bore holes within the area of the road embankment fill failure through their instruction to the first respondent. The instruction was duly complied by the respondents. The second SI report showed a combination of very loose clay sand, silt and silty clay beneath the ground surface. Another SI was conducted where eight exploratory boreholes was done with similar results. The appellant failed to specify the inaccuracy or error in the preparation of the first SI report. The pleadings of the appellant merely stated in general that the first SI report failed to disclose a thick layer of very soft silty clay at the area where the road fill embankment failure occurred (see paras 24 & 26).

(2) The respondents were well known contractors specialising in soil investigation and were designated to the appellant by the employer. A contractor is expected to carry out his function in a workmanlike manner, using all proper skill and care. As a SI specialist, the first respondent owed the appellant the duty of care to use reasonable skill and care. In the present case, there was no credible evidence to prove that the first respondent had in any way breached the standard of duty of care required of it in the circumstances of this case. There was also no evidence of any non-compliance of the Standard Engineering Practice (see paras 33 & 35).

(3) The JC had addressed his mind specifically to the issue of a breach of the duty of care owed by the respondents and the legal relationship between the parties. Having given due consideration to the respondent's defence that it had complied with instruction by RMR, the JC concluded that there was neither any breach of contract nor any negligence on the part of the respondents. There was no appealable error shown by the appellant that could properly justify an appellate intervention. The JC made various findings of fact impacting on the crucial issues. The JC's findings had been supported by the evidence as led before him and his findings

had not been without basis. Indeed, the JC's findings had been made with cogent reasons and there was no reason to disturb the same (see paras 36–37).

**[Bahasa Malaysia summary**

Perayu ialah seorang kontraktor kejuruteraan awam reka dan bina/siap guna yang dilantik oleh Jabatan Kerja Raya ('majikan') sebagai kontraktor utama bagi sebuah projek. Responden pertama dan kedua pula menyediakan kerja penyiasatan tapak ('SI'). Responden pertama telah dilantik oleh perayu untuk menjalankan SI di tapak projek. Perayu turut melantik RMR Consult ('RMR') sebagai jurutera perunding bagi projek tersebut. RMR telah mengeluarkan arahan kepada responden pertama untuk menjalankan kerja SI di tapak projek dan untuk melaksanakan lima penerokaan lubang gerudi di lokasi sebagaimana yang ditunjukkan dalam pelan. RMR kemudiannya telah mengeluarkan suatu arahan baharu kepada responden pertama yang menggantikan arahan yang terdahulu dan menghendaki, antaranya, tujuh kuar penerokaan lubang gerudi hendaklah dilaksanakan di lokasi sebagaimana yang ditunjukkan dalam pelan. Setelah menyempurnakan SI, responden pertama telah menyediakan dan mengemukakan laporan SI ('laporan SI pertama') kepada perayu untuk diluluskan oleh majikan. RMR telah mengarahkan responden pertama untuk melaksanakan ujian lanjut terhadap keputusan penerokaan lubang gerudi tersebut dan laporan ujian telah dikemukakan kepada RMR. Dengan bergantung kepada kelulusan majikan terhadap laporan SI pertama itu termasuklah laporan ujian yang lain, RMR meneruskan untuk mereka projek tersebut. Ini diikuti dengan perayu yang meneruskan pembinaan projek tersebut. Walau bagaimanapun, apabila kerja pembinaan telah siap lebih kurang 80%, suatu kegagalan penambakan jalan yang besar telah berlaku. Akibatnya, kerja-kerja tidak dapat diteruskan dan siasatan untuk menentukan punca kegagalan itu telah dijalankan. Perayu kemudiannya melantik responden pertama untuk sekali lagi melaksanakan pengesahan lanjut SI di lokasi kegagalan itu berlaku. Perkara ini telah pun dilaksanakan dan suatu laporan lanjut SI ('laporan SI kedua') telah dikemukakan kepada perayu. RMR turut mengeluarkan suatu laporan berhubung dengan kegagalan penambakan itu dan mencadangkan langkah-langkah pemulihan dan mengemukakan laporan tersebut kepada majikan. Pihak majikan tidak meluluskan mahupun menerima langkah-langkah pemulihan yang dicadangkan itu. Selanjutnya, pihak majikan telah menamatkan kontrak pembinaan dengan perayu. Perayu mengalami kerugian dan kerosakan yang menjadi kausa tindakan saman perayu terhadap responden dalam rayuan ini. Semasa perbicaraan, isu utama di hadapan mahkamah adalah sama ada laporan SI pertama yang disediakan oleh responden pertama adalah tidak tepat dan terkhilaf dan merupakan satu-satunya punca kegagalan penambakan itu. Pesuruhjaya kehakiman ('PK') telah menolak tuntutan perayu atas alasan bahawa penyiasatan tapak yang dijalankan itu bukanlah tidak tepat atau terkhilaf tetapi sebaliknya ia berpunca daripada penyiasatan tapak yang tidak mencukupi yang menyebabkan rekaan

yang tidak tepat bagi penambakan itu. Maka, rayuan ini. A

**Diputuskan**, menolak rayuan ini:

(1) PK telah mempertimbangkan secara mendalam isu-isu yang berhubungan dengan ketepatan laporan SI pertama itu. Pihak RMR telah mengarahkan pelaksanaan dua penerokaan lubang gerudi dalam kawasan kegagalan penambakan jalan melalui arahan mereka kepada responden pertama. Arahan yang diberikan telah dipatuhi dengan sewajarnya oleh responden-responden. Laporan SI kedua menunjukkan terdapat gabungan pasir lempung, lodak dan lempung berlodak yang longgar di bawah permukaan tanah. Suatu SI yang lain telah dijalankan yang menunjukkan lapan penerokaan lubang gerudi telah dibuat dengan keputusan yang sama. Perayu telah gagal untuk menyatakan tentang ketidaktepatan atau kesalahan dalam penyediaan laporan SI pertama. Pliding pihak perayu hanya menyatakan secara am bahawa laporan SI pertama telah gagal untuk menunjukkan bahawa terdapat suatu lapisan lempung lodak yang sangat lembut pada kawasan kegagalan penambakan jalan itu berlaku (lihat perenggan 24 & 26). B C D

(2) Responden-responden merupakan kontraktor terkenal yang mempunyai kemahiran khusus dalam bidang penyiasatan tapak dan ditugaskan kepada perayu oleh pihak majikan. Seorang kontraktor adalah dijangka untuk melaksanakan tugasnya dalam tatacara yang sepatutnya, menggunakan semua kebolehan dan penjagaan yang sepatutnya. Sebagai seorang pakar SI, responden pertama terhutang kepada perayu suatu kewajipan berjaga-jaga untuk menggunakan kebolehan dan penjagaan yang sewajarnya. Dalam kes ini, tidak terdapat keterangan boleh percaya untuk membuktikan bahawa responden pertama telah dengan apa-apa cara melanggar standard kewajipan berjaga-jaga yang dikehendaki darinya dalam hal keadaan kes ini. Tidak terdapat juga keterangan tentang apa-apa kegagalan mematuhi Amalan Standard Kejuruteraan (lihat perenggan 33 & 35). E F G

(3) PK telah menjuruskan mindanya secara khusus kepada isu pelanggaran kewajipan berjaga-jaga yang terhutang oleh responden dan hubungan perundangan antara pihak-pihak. Setelah memberikan pertimbangan sewajarnya kepada pembelaan responden bahawa ia telah mematuhi arahan oleh RMR, PK telah merumuskan bahawa tidak terdapat apa-apa pelanggaran kontrak mahupun apa-apa kecuaian bagi pihak responden-responden. Tidak terdapat kesalahan yang boleh dirayu yang ditunjukkan oleh perayu yang boleh mewajarkan suatu campur tangan rayuan. Pihak PK telah membuat pelbagai dapatan fakta yang memberi kesan kepada isu-isu penting. Dapatan oleh PK telah disokong oleh keterangan yang dibentangkan di hadapannya dan dapatannya bukanlah tidak mempunyai asas. Sesungguhnya dapatan oleh PK itu telah dibuat H I

dengan alasan yang meyakinkan dan tidak ada sebab untuk mengganggu dapatan itu (lihat perenggan 36–37).]

**Notes**

For cases on negligence in general, see 12(1) & (2) *Mallal's Digest* (5th Ed, 2015) paras 1046–2139.

**Cases referred to**

*Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, QBD (refd)

**Appeal from:** Civil Suit No MT-22–1519 of 2009 (High Court, Shah Alam)

*Hor Shir Luy (Raja, Darryl & Loh) for the appellant.*
*Ravi Nekoo (Hakem Arabi & Assoc) for the respondents.*

**Hasnah Hashim JCA:**

INTRODUCTION

**[1]** This appeal is against the decision of the High Court dismissing the appellant's claim for damages with costs against the first and second respondents.

**[2]** We heard the appeal on 27 November 2015 and after hearing the parties, we adjourned the matter for our consideration. We now deliver our decision and the reasons for the same.

SUMMARY OF THE MATERIAL FACTS

**[3]** The appellant is a design and build/turnkey civil engineering contractor. The Jabatan Kerja Raya ('the employer') appointed the appellant as the main contractor for a project described as 'Projek Menaik taraf/Meninggi Aras Jalan Chukai ke Air Putih KM4–KM6 dan KM11–KM14, Sungai Pinang Kemaman, Terengganu ('the project').The contract sum for the project was RM5,910,560. The first and second respondents are related companies providing soil investigation works. By a letter dated 2 September 2003 the first respondent was appointed by the appellant to conduct soil investigation ('SI') at the site of the project.

**[4]** The appellant appointed RMR Consult ('RMR') as the consultant engineer for the said project. On 15 September 2003 the first respondent together with RMR and Jurukur Putra was invited to attend a site visit followed by a site meeting. After the visit and meeting RMR issued an instruction on 6 October 2003 to the first respondent to conduct SI works at the project site

and to carry out five exploratory boreholes at the locations as indicated in the plans. Subsequently on 20 October 2003 RMR issued a revised instruction to the first respondent superseding the earlier instruction and requiring seven exploratory boreholes (including several at revised locations), four hand augers, three Piezocone tests and 16 Mackintosh probes to be carried out on the locations as indicated in the plans.

**[5]** After completing the SI the first respondent prepared and submitted the SI reports dated 22 October 2003 ('the first SI report') to the appellant to be approved by the Employer. On 4 November 2003 the first respondent submitted water samples to the Terengganu Chemistry Department for laboratory analysis. Sometime in November 2003 RMR instructed the first respondent to carry out further tests on the exploratory borehole results and the test reports were submitted to RMR on 23 December 2003. RMR in reliance on the employer's approval of the first report as well as the other test reports proceeded to design the project.

**[6]** The design was submitted to the employer for approval and upon obtaining the same the design was then handed to the appellant to proceed with the construction at the KM11–KM14 stretch of the project. However, on 11 June 2007 when the construction works were approximately 80% completed a massive road embankment fill failure occurred adjacent to the new bridge abutment B of Sungai Pinang. As a result of the embankment failure the works could not proceed and investigations were conducted to ascertain the cause of the failure.

**[7]** The appellant appointed Geopile Testing Resources ('Geopile') to carry out exploratory boreholes at the failed embankment area. Geopile submitted its report sometime in July 2007. Subsequently the employer instructed the appellant to appoint the first respondent to carry out confirmatory SI at the location where the road embankment fill failure occurred.

**[8]** On 4 September 2007 the employer convened a special meeting to resolve the road embankment fill failure and instructed the appellant to appoint the first respondent to carry out a further confirmatory SI at the location where the failure occurred. This was duly done and a further SI report dated 31 October 2007 ('the second SI report') was submitted to the appellant.

**[9]** RMR in December 2007 also produced a report in relation to the failure of the embankment and recommended remedial measures and submitted the said report to the employer. The employer neither approve nor accepted the recommended remedial measures.

**[10]** Subsequently, the employer terminated the construction contract with the appellant on 8 January 2008 due to the poor progress of the project. The first respondent carried out another SI in July 2008 and submitted a further SI report ('the third SI report') to the appellant.

**[11]** As a result of the termination the appellant suffered losses and damages which form the cause of action of the appellant's suit against the respondents in this appeal. It is the appellant's case that the embankment failure was because of the inaccuracy/error in the first SI report as it failed to disclose the presence of the thick layer of very soft to soft silty clay. The design prepared by RMR was based on the soil condition as reported in the first SI report.

THE HIGH COURT

**[12]** The key findings of the learned judge may be summarised as follows:

(a) the appellant did not cogently illustrate or explain how the alleged inaccuracy or error came about in particular the exploratory boring process and its subsequent reporting was not in compliance with the Nota Teknik 2008 and the relevant standard engineering practice as required in cl 5.3 of section E, technical requirements in the need statement of the employer;

(b) the alleged non-represented layer of very soft silty clay was at best 12mt;

(c) the sub surface soil composition both in content and profile cannot be expected to be homogenous and consistent throughout a defined area;

(d) mere comparison of bore logs is inconclusive and inadequate to blame the first respondent that the impugned borehole BH-B4 was done inaccurately or erroneously. The location of the borehole BH-B4 was neither wrong nor in breach of the instruction of the RMR party at that material time; and

(e) the precise location was only known after the occurrence of the embankment failure ie post 2007 and it is not disputed that the intended location was in swamp and beneath the constructed bridge along the new road alignment.

THE APPELLANT'S SUBMISSION

**[13]** It is the submission of the appellant that the first respondent has a duty in contract and tort to exercise reasonable care, skill and diligence in carrying out the SI for the project. The respondents were in breach of contract and/or negligent as they had produced the first SI report that was inaccurate. The said report was relied upon by RMR in the design of the project and the appellant carried out the construction works for the project based on the said design.

**[14]** The appellant argued that the all the post 2007 SI reports reported the presence of a thick layer of very soft to soft silty clay. It is therefore highly improbable that the first SI report reflected the true nature and property of the soil conditions of the instructed locations. The first SI report was inaccurate and/or erroneous as it failed to disclose or report the presence of a thick layer of very soft to soft silty clay. The design prepared based on the first SI report was inadequate since the actual soil condition was substantially different than what was reported. The construction works of the project were carried out based on the said design which had ultimately led to the embankment failure.

**[15]** The appellant argued that the first respondent failed to comply with RMR's instruction as they had carried out the borehole not at the instructed location but at the road shoulder of the old existing road instead. The first respondent did not inform RMR on the change of location.

**[16]** It is further submitted that the first SI report was inaccurate and erroneous. The three post 2007 reports were more accurate as they reflected the actual soil condition at the project site. The inaccurate and erroneous first SI report led to the insufficient design that resulted in the embankment failure.

**[17]** Therefore, the inaccurate and/or erroneous first SI report was the sole cause of the embankment failure.

THE RESPONDENTS' SUBMISSION

**[18]** The respondent argued that it was not illustrated by the appellant how the alleged inaccuracy or error came about. The trial judge had considered all the issues raised by the appellant and concluded that the mere comparison of bore logs is inconclusive and inadequate to blame the first respondent that the impugned borehole BH-BH4 was done inaccurately. It is the submission of the respondents that the finding of facts by the trial judge that there was a design failure ought not to be disturbed.

DECISION

**[19]** At the trial the primary issue before the court was whether the first SI report prepared by the first respondent was inaccurate and erroneous and the sole cause of the embankment fill failure. Both parties called their own experts to assist the trial court in determining the issue.

**[20]** On 30 March 2015, the learned judicial commissioner dismissed the appellant's claim on the ground that the soil investigation that was carried out was not inaccurate or erroneous but instead it was due to insufficient soil investigation that resulted in inadequate design of the embankment.

**[21]** Before us, the learned counsel for the appellant argued that the first SI report was inaccurate and/or erroneous as it failed to disclose or report the presence of the thick layer of very soft to soft silty clay. The design was prepared based on the soil condition reported in the first SI report. The actual soil turned out to be substantially different from what was reported in the said first SI report. The construction of the project was based on the design by RMR and eventually led to the embankment failure. Experts from both sides agreed that the design was good and sufficient based on the first SI report as it met with the required factor for safety.

**[22]** After the first SI report all the other three SI reports were prepared post embankment failure. All the post 2007 reports confirmed the presence of a thick layer of very soft to soft silty clay at the project site.

**[23]** The second SI report prepared by the first respondent on the instruction of RMR reported a thick layer of very soft silty clay with approximately 15–16.5mt thick. The third SI report by the first respondent was prepared at the instruction of the employer. It too reported the presence of thick layer of very soft to soft silty clay with the average thickness of 9.4. It is the submission of the appellant that the respondents failed to state in the first SI report the presence of very soft to soft silty clay at the project site. The failure to do so by the first respondent would render the said first SI report to be inaccurate and erroneous.

**[24]** We are of the considered opinion that the learned judicial commissioner had considered in depth the issues relating to the accuracy of the first SI report. RMR had instructed the carrying out of two exploratory bore holes within the area of the road embankment fill failure through their instruction dated 6 October 2003 to the first respondent. The instruction was duly complied by the respondents.

**[25]** The second SI report prepared in 2007 showed a combination of very loose clay sand, silt and silty clay with a SPT value of 0–11mt thick at 5mt–16mt depth beneath the ground surface. Another SI was conducted in 2008 where eight exploratory boreholes was done with similar results.

**[26]** The appellant failed to specify the inaccuracy or error in the preparation of the first SI report. The pleadings of the appellant merely states in general that the first SI report failed to disclose a 15–16.5mt thick layer of very soft silty clay at the area where the road fill embankment failure occurred.

**[27]** Both parties had relied on expert witnesses to assist the court on the technical issues. The expert witnesses are professional engineers. The appellant's expert witness testified that the borehole BH-BH3 and BH-BH4

were likely to be fictitious. BH-BH3 showed deposit of limestone bedrock and the nearest was at Gua Musang approximate 165km away from the project site but this was rebutted by one of the respondents' witnesses who confirmed the presence of limestone bedrock at only 21km away from the project site. The appellant's expert witness had also criticised the wash boring method of the borehole exploration that was applied by the respondents that produced a SPT value of 0.

**[28]** The trial judge, however, having considered thoroughly both the expert witnesses' testimony leaned towards the respondents' expert witness. The respondents' expert explained that since the boreholes were done on the road shoulder of the existing old road constructed 20 years earlier they are likely to be dissimilar with the boreholes conducted post 2007 on virgin river bank ground and on recently constructed embankment. The boreholes in 2003 were at different locations from the boreholes post 2007. Furthermore, the respondents' expert witness explained that the 2003 boreholes were conducted at the shoulder of the existing road at that time and the underlying soils below the said road would have been subjected to some consolidation since the construction of the existing road.

**[29]** The mere comparison of the bore logs is inconclusive and insufficient to ascertain that the respondents were negligent and that the first SI report was inaccurate or erroneous. Furthermore, RMR as the consultant engineer responsible for the design had relied on the 2003 bore logs in particular BH-BH4. RMR should have considered the available soil data in the area such as the Piezocone PZ-2 test results which showed weaker soils of SPT value of 1–3 for depth about 0.55–13.7mt beneath the ground surface.

**[30]** We have perused through the facts as narrated and the evidence revealed that the first respondent had carried out the SI according to the instruction of RMR. As design consultant RMR should have at that material time reverted to the appellant or even undertake further SI and soil strength test as they were aware of the condition of the terrain surrounding the project site.

**[31]** It was argued by the appellant that the respondents have a duty in contract and tort to exercise reasonable care, skill and diligence when conducting soil investigation works. The respondents were in breach and/or negligent in the preparation of the first SI report relied upon by the appellant the design of the project.

**[32]** The *locus classics* as to the standard of duty of care of a professional is the case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at p 121. It states the principle as follows:

> But where you get a situation which involves the use of some special skill or

competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular act ...

**[33]** The respondents are well known contractors specialising in soil investigation and were designated to the appellant by the employer. A contractor is expected to carry out his function in a workmanlike manner, using all proper skill and care. As a SI specialist the first respondent owed the appellant the duty of care to use reasonable skill and care.

**[34]** In 2003 the first respondent had conducted the SI at borehole BH-BH4 according to the instructions of RMR at that material time. The trial judge had considered the issue of the borehole BH-BH4 not being carried out at the instructed location in great detail. The instructed location was in fact in a swamp. In the drawings the exact location of boreholes was however, not specified. The BH-BH4 was carried out at the road shoulder of the old road alignment as it was standard practice and sensible as the Project involved the upgrading of the old road. The borehole was not specifically stated with coordinates in the drawing. As the drawing was in a small 1:1000 scale it was not possible to determine the exact location of the borehole from the drawing itself. The precise location was only ascertained in 2007 after the occurrence of the embankment failure.

**[35]** In the present case, there is no credible evidence to prove that the first respondent has in any way breached the standard of duty of care required of it in the circumstances of this case. We agree with the findings of the learned judicial commissioner that there is no evidence of any non-compliance of the standard engineering practice as stipulated in cl 5.3, section E of the technical requirements by the first respondent. There can be no negligence on the part of the respondents as they exercised reasonable skill and care as soil specialist when they conducted the SI as instructed and in accordance with the standard engineering practice.

**[36]** We find that the learned judicial commissioner had addressed his mind specifically to the issue of a breach of the duty of care owed by the respondents and the legal relationship between the parties. Having given due consideration to the respondent's defense that it had complied with instruction by RMR the learned judicial commissioner concluded that there was neither any breach of contract nor any negligence on the part of the respondents.

CONCLUSION

**[37]** Having considered the decision of the learned judicial commissioner in its entirety in light of the materials placed before us and the able submissions by both learned counsel, oral as well as written, we are of the respectful view that there is no appealable error that had been shown by the appellant that could properly justify an appellate intervention. As can been seen above, the learned judicial commissioner had made various findings of fact impacting on the crucial issues. We find that his findings had been supported by the evidence as led before him and his findings had not been without basis. Indeed the learned judicial commissioner's findings had been made with cogent reasons and we see no reason to disturb the same.

**[38]** For these varied reasons, we dismiss the appeal of the appellant with costs in favor of the respondents. We affirm the decision of the High Court. Deposit to be refunded to the plaintiff.

*Appeal dismissed.*

Reported by Afiq Mohamad